Filed Oct. 23, 1905

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

THE KNAPP, STOUT & CO. COMPANY,
Plaintiff in Error,
vs.
JOHN MCCAFFERY,
Defendant in Error.
No. 205.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT, BRIEF AND ARGUMENT OF C. P. WISE FOR PLAINTIFF IN ERROR.

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IN THE

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OCTOBER TERM, 1899.

THE KNAPP, STOUT & CO. COMPANY,
Plaintiff in Error,
vs.
JOHN McCAFFREY,
Defendant in Error.

No. 263.

STATEMENT.

On the sixth day of April, 1893, John McCaffrey, of Davenport, Iowa, made a written contract with the Schulenburg & Boeckeler Lumber Company, a corporation, formed under the laws of the State of Missouri, and doing a lumber business there, and having large lumber interests in the State of Minnesota. (Printed Transcript of Rec., p. 56.) In the contract it is stated that McCaffrey, having purchased of the Schulenburg & Boeckeler Lumber Company three steamboats (tow boats), for $17,500, it was agreed that McCaffrey was to tow all the rafted lumber to St. Louis, Missouri, which the said lumber company would deliver to him at or below Stillwater, Minnesota. The lumber was to be delivered in St. Louis in quantities not

exceeding a half raft at a time. McCaffrey was to be paid for towing from Stillwater to St. Louis $1.12½ per thousand feet, board measure, for the lumber contained in the raft.

The lumber company was to give McCaffrey the towing of 75,000,000 feet during the three years succeeding the date of the contract, and all over that amount—if they had any more to tow—from Stillwater to St. Louis.

On the 13th of October, 1894, there was delivered to McCaffrey's steamer, Robert Dodds, at Stillwater, Minnesota, a raft called raft No. 10. The river being low and navigation difficult, McCaffrey was instructed to divide the raft, to bring one-half to St. Louis, and lay up the other half in some safe harbor. In compliance with these instructions, the raft was, on October 20, 1894, divided at Boston Bay Harbor, in Mercer County, Illinois, and one-half was left there, and the other half was towed to St. Louis and delivered to the lumber company there on November 2d, 1894. The steamer, Robert Dodds, returned to Boston Bay harbor and laid up outside of the raft for the winter.

On November 5, 1894, the Schulenburg & Boeckeler Lumber Company sold the half raft No. 10 in Boston Bay Harbor to The Knapp, Stout & Co. Company for $15,000—$5,000 cash, and the company's note due in four months for $10,000 (which was paid at maturity), and gave the Knapp, Stout & Co. Company a bill of sale for the lumber (Printed Transcript of Rec., p. 145), and wrote to their watchman who had charge of the raft, informing him of the sale. (Printed Transcript of Rec., p. 201.)

The Knapp, Stout & Co. Oompany is a corporation formed under the laws of Wisconsin, with its principal office at Menominee, Wisconsin, but does a large lumber business in St. Louis, Missouri. On the 6th of November, the Knapp, Stout & Co. Company wrote to the same watchman informing him they had purchased the lumber, and

desired him to take charge of the raft for them. (Printed Transcript of Rec., p. 173.)

On the 9th day of November, 1894, Schulenburg & Boeckeler Lumber Company made an assignment for the benefit of creditors to Eugene Tittman, of St. Louis, Missouri, and David Bronson, at Stillwater, Minnesota.

McCaffrey, on hearing of the assignment, went to St. Louis, saw Wm. Boeckeler, of the Schulenburg & Boeckeler Lumber Company, who informed him the half raft in Boston Bay Harbor had been sold and delivered to Knapp, Stout & Co. Company, who had paid for the same. McCaffrey then called on John H. Douglas, the manager of the Knapp, Stout & Co. Company in St. Louis, and wished to know if the information was true, and was informed it was. He then asked if they wished the raft towed to St. Louis, and was informed they did not; that they did their own towing. He claimed that he had not been fully paid for towing the raft. He was informed that the Knapp, Stout & Co. Company owned the raft, had paid for it, that it was their property, and they had a watchman in possession of it.

On the 19th of February, 1895, McCaffrey filed his bill in chancery in the Circuit Court of Mercer County, Illinois, making the Knapp, Stout & Co. Company, the Schulenburg & Boeckeler Lumber Company, and the assignees of the latter company, defendants, and in the bill he claimed a lien on half raft No. 10. The bill prayed that the defendants might be decreed to pay him the amount of the towage and charges and interest, and in default that the Court would direct the sale of so much of said half raft No. 10 as would satisfy the amount so due McCaffrey, with costs. The bill set out the contract made between Schulenburg & Boeckeler Lumber Company, and is an attempt to invoke the aid of a court of equity to foreclose the lien McCaffrey claimed for towing the raft.

McCaffrey claimed in his bill, which was sworn to, that the Knapp, Stout & Co. Company were threatening to take the raft away by force, and that there was great danger that the raft might be carried away by high water, and at the March Term, 1895, made a motion for the appointment of a receiver.

The Knapp, Stout & Co. Company then entered their appearance for the purpose of answering the motion for a receiver, and for no other purpose, in no way entering its general appearance, or admitting that the Court had jurisdiction over it, or the subject matter in controversy in said suit; but protesting that the Circuit Court had no jurisdiction thereof, and objected to the appointment of a receiver. And also made a cross motion that John McCaffrey, if he should continue to claim a lien on said raft, and the possession thereof, be required to file a bond in the court in the sum of $25,000, with good security, conditioned that said McCaffrey should pay to Knapp, Stout & Co. Company whatever damage it might suffer in case the Circuit Court should decide that it had not jurisdiction, or that McCaffrey had no lien and no right to hold the raft. Among the reasons assigned was: That it appeared by the bill that the raft was in danger of destruction by the elements; that McCaffrey was not able to pay the damages if the raft should be destroyed; that the value of the raft was $17,000 and that McCaffrey did not claim a lien for but $5,000; that Knapp, Stout & Co. Company paid $15,000 for the raft, in ignorance of any claim that McCaffrey might have for any lien, and after having been informed by the owners that McCaffrey was not in possession, and did not have any lien; that McCaffrey was not in possession of the raft when purchased by the Knapp, Stout & Co. Company, but that the raft was in the possession of the Schulenburg & Boeckeler Lumber Company by their agent, E. L. Willis. (Printed Transcript of Rec., p. 20.)

The Knapp, Stout & Co. Company offered to give security for a sum of $6,000 if McCaffrey declined to give bond, with condition that defendant take the raft, and pay to McCaffrey the amount of any lien that may be decreed in his favor in this suit against said raft, and all costs of this suit, if McCaffrey is decreed herein to have a lien against said raft.

Upon the second day of April, 1895, the Court, by the consent of the parties, entered in said suit the following order:

> "Upon consideration of such motion and cross motion, and by consent of parties, orders and adjudges that Knapp, Stout & Co. Company enter into a penal bond with penalty in the sum of six thousand dollars payable to complainant herein with two sufficient sureties; * * * conditioned that if Knapp, Stout & Co. Company shall well and truly pay or cause to be paid to complainant, John McCaffrey, all sums of money for which he has a lien upon the property described in the bill herein as half raft No. 1 (in the bill the raft is called No. 10, but when divided the half left at Boston Bay is called half raft No. 1; the half taken to St. Louis as half raft No. 2), whether such lien be established in this or any other suit to which Knapp, Stout & Co. Company may be defendants, or in a suit on such bond, * * * and shall well and truly pay and satisfy all such costs as may be adjudged against said Knapp, Stout & Co. Company, in this suit, or any other suit which complainant may bring against said Knapp, Stout & Co. Company, or on any such bond for the collection of the amount for which complainant, John McCaffrey, claims to have a lien upon the property above described."
>
> "It is further ordered and adjudged upon filing such bond the complainant shall surrender the property to Knapp, Stout & Co. Company."
>
> "It is further ordered, adjudged and decreed, that the rights of the parties hereto shall in no way be

prejudiced by this order or by complainant surrendering the property in accordance with this order, but all the rights of the parties hereto, *including the right of the defendant to object to the jurisdiction of this Court, are hereby expressly reserved.* And it is further expressly ordered and adjudged that this order shall not in any way prejudice the rights of the parties herein as to the facts essential to the determination of this cause, and that in case complainant shall at any time hereafter bring any other suit to enforce the lien he claims on the property included in half raft No. 1, such suit shall be, and this suit shall be in all things determined, as though he had not surrendered possession under this order, and his rights to a lien on such half raft shall in no wise be prejudiced by his compliance with this order, and all rights to a lien are hereby expressly reserved, and may be enforced in a suit against Knapp, Stout & Co. Company, precisely as though he had not under this order surrendered possession of said half raft, but in such suit hereafter brought, complainant upon pleading and proving this order, shall have the same right to proceed to decree or judgment against Knapp, Stout & Co. Company, as though he, complainant, still continued in such possession of such property as he had at the time this suit was instituted. It is further ordered and decreed that this order shall not be construed as a confession by Knapp, Stout & Co. Company, that complainant is rightfully in possession of half raft in controversy, or as a confession that complainant had possession of such property when this suit was brought, nor is it in any way an adjudication by this Court that any one is rightfully in possession of said property." (Printed Transcript of Rec., pp. 52-53.)

Thereupon, on the 13th day of April, 1895, the Knapp, Stout & Co. Company filed a bond as required by the Court and took the raft. The condition of the bond was:

> "That if the Knapp, Stout & Co. Company shall pay to John McCaffrey all sums of money for which he has

or had at the time said suit was instituted a lien as against Knapp, Stout & Co. Company, on half raft No. 1 * * * whether such lien be established in said cause now pending, or in any other suit to which Knapp, Stout & Co. Company may be defendants, or in a suit on the bond, or in any other suit that John McCaffrey may bring against Knapp, Stout & Co. Company for the collection of the amount for which complainant shall have been adjudged by the Court in said suit or suits to have a lien upon said half raft No. 1." (Printed Transcript of Rec., p. 22.)

At the August Term, 1895, the Knapp, Stout & Co. Company, the Schulenburg & Boeckeler Lumber Company, filed separate answers, setting up their defenses, and the assignees also answered, filing a joint answer. In each and all of these answers it is denied that the Circuit Court of Mercer County has any jurisdiction of the case, and in each answer it is averred that exclusive jurisdiction is vested in the United States Courts in Admiralty.

A hearing was had on the bill, answers, replication and evidence taken in open court at the March Term, A. D. 1896, and at the March Term, 1897, a decree was entered dismissing the bill at complainant's costs, the Court deciding it had no jurisdiction.

An appeal was taken to the Appellate Court of Illinois, Second District, by McCaffrey.

The Appellate Court reversed the decision of the Circuit Court, deciding the Circuit Court of Mercer County, Illinois, had jurisdiction and remanded the cause with directions to the Circuit Court to enter a decree in favor of McCaffrey in the sum of $3,643.17, with interest thereon from November 13, 1894, at five per cent.

Knapp, Stout & Co. Company appealed to the Supreme Court of the State of Illinois, claiming that the contract being maritime, the lien was only enforcible in the United States Courts of Admiralty, and the Circuit Court of

Mercer County, Illinois, had no jurisdiction. The Supreme Court of Illinois affirmed the judgment of the Appellate Court, and Knapp, Stout & Co. Company appeal from that decision to this Court.

The decisions of the Appellate and Supreme Courts of Illinois have settled that McCaffrey had not delivered the half raft, No. 1, that there was due him a sum of money for the towage of the same, and that he had a lien on the raft for the towage, and equity would enforce that lien.

The questions before this Court are: 1st. Is the contract of towage a maritime contract? If so, must not the lien for towage be enforced only in United States Courts of Admiralty? and therefore the Circuit Court of Mercer County had no jurisdiction. 2d. Did Knapp, Stout & Co. Company, by entering into bond under the order of Court, waive their right to insist that the State Courts of Illinois had no jurisdiction.

BRIEF.

I.

The contract in this case was for the towage of rafts on the Mississippi River from Stillwater, Minnesota, to St. Louis, Missouri. It is a maritime contract.

1 Amer. & Eng. Ency. Law (2d. Ed.), p. 255;
Benedict on Admiralty, Sec. 213 (Ed. 1894);
The Encyclopedia Brittanica, Article "Ship";
Ins. Co. v. Dunham, 11 Wall. 26-29;
The W. J. Walsh, 5 Benedict, 72;
Amer. & Eng. Ency of Law, Vol. 26, pp. 93-4;
Mason v. Steam Tug Muntaugh, 3 Fed. Rep. 404;
The Cheeseman v. Two Ferry Boats, Fed. Cas. No. 2633;
Williams v. Steam Tug Cox, 3 Fed. Rep. 645;
The Dick Keys Fed. Cases, No. 3898;
Connolly v. Ross, 11 Fed. Rep. 342;
The E. M. McChesney Fed. Cases, No. 4464;
The Nannie Lamberton, 79 Fed. Rep. 121;
The Florence Fed. Cases, No. 4879;
In re Williams *et al.*, 74 Fed. Rep. 648;
The Gate City Fed. Cas., No. 5267;
The E. Luckenback, 15 Fed. Rep. 924;
The General Cass, Fed. Cas. No. 3808;
The Wm. Muntaugh, 17 Fed. Rep. 259;
The Flora Fed. Cas., No. 4878;
Disbrow v. Walsh Bros., 36 Fed. Rep. 607;
The Kate Tremaine Fed. Cas., No. 7622;
The Alabama, 19 Fed. Rep. 544; 22 Fed. Rep. 449;
The Pioneer, 30 Fed. Rep. 206;
Saylor v. Taylor, 77 Fed. Rep. 476;
Rodgers v. Scow, 80 Fed. Rep. 736;
The Hezekiah Baldwin, 8 Ben. 556;
The Mystic, 30 Fed. Rep. 73;
The Governor, 77 Fed. Rep. 1000;
The Mayflower, 80 Fed. Rep. 736;
U. S. v. One Raft of Timber, 13 Fed. Rep. 796;
Muntz v. A Raft of Timber, 15 Fed. Rep. 555;

The Rock Island Bridge, 6 Wall. 213;
Cartier v. The F. P. M. No. 2, 33 Fed. Rep. 511;
Seabrook v. Raft, 40 Fed. Rep. 596;
Fifty Thousand Feet of Timber, 2 Low. 64;
A Raft of Spars, 1 Abbott's Admr. 485;
Wilson v. Sibley, 36 Fed. Rep. 379;
Ex Parte Boyer, 109 U. S. 629;
Ex Parte Easton, 95 U. S. 68;
The International, 83 Fed. Rep. 840;
The Atlantic, 53 Fed. Rep. 607;
The Starbuck, 61 Fed. Rep. 502;
Lawrence v. Flatboat, 84 Fed. Rep. 200;
Affirmed in Southern Log Cart Co. v. Lawrence, 86 Fed. Rep. 907;
Whitmire v. Cobb, 88 Fed. Rep. 91;
Bywater *et al.* v. A Raft of Piles, 42 Fed. Rep. 917;
The New York, 93 Fed. Rep. 495;
McMasters v. One Dredge, 95 Fed. Rep. 832;
The Public Bath No. 13, 61 Fed. Rep. 692;
The International, 83 Fed Rep. 840;
McRae v. Dredging Co., 86 Fed. Rep. 344.

II.

The contract being maritime, to enforce the lien for towage of the raft the United States Admiralty Courts have exclusive jurisdiction, not only of Federal Courts, but of all State Courts.

The Genesee Chief, 12 How. (U. S.) 457;
The Magnolia, 20 How. (U. S.) 296;
The Moses Taylor, 4 Wall. 411;
The Steamboat Ad. Hine. v. Trevor, 4 Wall. 555;
The Belfast, 7 Wall. 624;
The Eagle, 8 Wall. 15;
The J. E. Rumbell, 148 U. S. 1;
Moran v. Sturges, 154 U. S. 256;
The Glide, 167 U. S. 606.

a. The admiralty jurisdiction extends to the entire navigable river system of the United States.

Ad. Hine v. Trevor, 4 Wall. 555;
Ex Parte Garnett, 141 U. S. 1;
McGinnis v. Pontiac, 5 McLean, 359;
The Mantella, 87 U. S. (20 Wall.) 430;
The Magnolia, 20 How. 296;
Ex Parte Boyer, 109 U. S. 629.

b. The ninth section of the act of 1789 saves to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. This has been incorporated in all subsequent revisions of the United States Statutes, and is now the law. This suit does not come within this saving clause; it is not an action at common law, but a suit in equity.

The Moses Taylor, 4 Wall. p. 431;
The Hine, 4 Wall. p. 555;
Moran v. Sturges, 154 U. S. pp. 256 276;
The Glide, 167 U. S. 606 617.

III.

The plaintiff in error has omitted nothing it should have done, or done anything which prevents it from insisting that the State Courts had no jurisdiction of this suit.

ARGUMENT.

I.

The contract in this case was for the towage of rafts on the Mississippi River from Stillwater, Minnesota, to St. Louis, Missouri. It is a maritime contract.

Lumber on the Mississippi River is placed into a raft. It consists of a number of cribs of lumber, all securely fastened together. A raft contains many thousands of feet of lumber. Rafts have large oars at each end, which are worked by the crew on the raft to keep it in the channel of the river. A pilot, when the raft is floating, forms part of the crew. The raft floated down the river, guided by the pilot and crew, until it reached its destination, when it was landed. Of late years, on account of bridges being built in the Mississippi River, making it dangerous to float rafts between the bridge piers, rafts are now generally towed by steamboats.

The contract in this case is plain; it is to tow rafts with steamboats from Stillwater, Minnesota, to St. Louis, Missouri.

Is not this a maritime contract?

Benedict, in his work on Admiralty, Sec. 213 (Ed. 1894), says:

> "It is believed that a sure guide, in matters of contract, is to be found in the relation which the cause of action has to a ship, the great agent of maritime enterprise, and to the sea as a highway of commerce. Where there is navigable water and ships and vessels, these are the subjects of maritime law. If a case relates to a ship, or to commerce on navigable waters, then it is subject to the maritime law, and is a case of admiralty and maritime jurisdiction."

The Encyclopedia Brittanica, Article "Ship," says:

> "A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subject of commerce on high seas or navigable waters. It may arise with reference to vessels, steamers and rafts, and upon goods and merchandise carried by them."

There could be no maritime lien without there being a maritime contract.

In the Belfast, 7 Wall. 637, it was contended that admiralty jurisdiction did not attach, because goods were to be transported from one port to another in the same State, and were not the subject of interstate commerce. But as the transportation was on a navigable river, the Court decided in favor of jurisdiction, because it was a maritime transaction. Justice Clifford said:

> "Contracts, claims or service, purely maritime, touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts."

If the lumber had been been loaded in the steamer instead of towing the lumber in the raft, it would have been a contract of freightage on navigable waters, and therefore a maritime contract. The Belfast, 7 Wall. 624; the Edely, 5 Wall. 481; the Bird of Paradise, 5 Wall. 545. If the lumber had been loaded on flatboats or barges, and thus towed, it would have been the same as towing the raft. Furnishing the motive power by towing the lumber in the raft can make no difference.

In the W. J. Walsh, 5 Benedict, 72, Justice Benedict said:

> "There is no room to contend that towage contracts set up in the libel are not maritime contracts. A maritime contract in law, as now understood, is any contract which necessarily is appurtenant to navigation, such as the transportation of passengers or freight on navigable waters, or the navigation of vessels on such waters, or supply the necessities of vessels used on

such waters. A contract to furnish the motive power to a vessel so used is of the same class. It appertains to navigation in the strictest sense, and is as distinctly maritime in character as a contract to steer a boat or to carry cargo in her. The steamboats which tow the boats and barges, by means of which commerce between New Jersey and New York is transacted, are as much engaged in navigation as are the boats in which the cargoes are placed, and it is not navigation, but commerce, among the states."

In Mason v. Steam Tug Murtaugh, 3 Fed. Rep. 404, the Court of Admiralty rendered judgment for negligently causing the loss of a barge and its cargo while towing; the same in Williams v. Steam Tug Co., 3 Fed. Rep. 645, and in Connolly v. Ross, 11 Fed. Rep. 342, for negligently causing the loss of a canal boat; the same in the Nannie Lamberton, 79 Fed. Rep. 121; *in Re* Williams *et al.*, 74 Fed. Rep. 648, it was a coal barge; in the E. Luckenback, 15 Fed. Rep. 924, it was a dredgeboat; in Wm. Murtaugh, 17 Fed. Rep. 259, it was a coal barge; in Disbrow v. the Walsh Brothers, 36 Fed. Rep. 607, a barge without sails or rudder used for transporting brick, on which men were employed in loading and unloading, was held to be subject to a lien for wages of the men employed; to the same effect are the Atlantic, 53 Fed. Rep. 607; the Public Bath, No. 13, 61 Fed. Rep. 692; Lawrence v. Flatboat, 86 Fed. Rep. 200; the Destroyer, 56 Fed. Rep. 310; Log Cart & Supply Co. v. Lawrence, 86 Fed. Rep. 907; McRae v. Bowers Dredging Co. 86 Fed. Rep. 344; (this last case quotes numerous authorities); the Starbuck, 61 Fed. Rep. 502. In the Alabama, 19 Fed. Rep. 544, it was held that dredges and scows with no motive power of their own are vessels and subject to a maritime lien for towing. On appeal to the Circuit Court judgment was affirmed in 22 Fed. Rep. 449. To the same effect is the pioneer, 30 Fed. Rep. 206. These cases are followed in similar cases by Saylor v. Taylor, 77 Fed. Rep.

476. In Rogers v. Scow, 80 Fed. Rep. 736, it was held that a scow was liable for towage; and in the Hezekiah Baldwin, 8 Ben. 556, that a floating elevator was also. In the Mystic, 30 Fed. Rep. 73, a collision caused while towing ing in the Chicago River was held to be subject to admiralty jurisdiction.

In these cases the vessels, or boats, had no motive power, but they were towed, and this towing was held a maritime contract, and the lien for such towing enforceable in a court of admiralty. We take it there can be no difference in principle between such boats and a large raft of lumber and that the towage of a raft is a maritime contract. We think this has been clearly settled by authority as well as upon principle. In the United States v. One Raft of Timber, 13 Fed. Rep. 796; the Court held a raft was embraced in sections 4233 and 4234 of the Revised Statutes, and was liable to a penalty for not carrying white lights on the raft at night; that although rafts were not named in the statute, yet the words of the statute, "every vessel," included a raft.

In Muntz *et al.* v. A Raft of Timber, 15 Fed. Rep. 555, it was held that a raft of timber is subject to the jurisdiction of the Admiralty Court in the matter of salvage.

In the Rock Island Bridge, 6 Wall. 213, Justice Field used this language:

> "A maritime lien can only exist upon moveable things engaged in navigation, *or upon things which are the subjects of commerce on the high seas or navigable waters.* It may arise with reference to vessels, steamers and *rafts*, and upon goods and merchandise carried by them."

In Cartier v. The F. & P. M., No. 2., 33 Fed. Rep. 511, which was a suit brought by the owner of a raft, which was being towed in Lake Michigan, against the steamboat for negligently running into the raft, breaking it, and causing the loss of a number of the logs. It was con-

tended that a raft of logs was not the subject-matter of maritime jurisdiction so as to enable the owner to maintain the suit and recover for the injury and loss sustained. Dyer, J., after reviewing all the previous decisions and deciding the Court had jurisdiction, said:

> "Many other cases might be cited, showing the extension, in various directions of the admiralty jurisdiction since the days of the old tide-water doctrine —cases that include injuries to barges in tow of other vessels, ferry-boats, scows, yachts, pleasure boats, and other craft which would have had no recognition as "ships or vessels" in the earlier history of Admiralty law in this country. But further discussion of the question seems superfluous, as I have no doubt, in the present state of the judicial decision on this subject, this Court, as a court of admiralty, has jurisdiction of the controversy set forth in the libel and answer in this case."

In Wilson v. Sibley, 36 Fed. Rep. 379, a tug undertook to tow a raft from Bay Minette Creek to the City of Mobile, and in doing so caused a loss of part of the raft. The Court rendered a decree in favor of the libellant for the loss of the logs.

In Seabrook v. Raft, 40 Fed. Rep. 596, a steam dredge was run into by a raft and injured; the owner brought a libel *in rem*. It was claimed there was no jurisdiction; that a libel would not lie against a raft. The Court reviewed the various decisions on this point, and held the Court had jurisdiction, deciding, "that a raft is a water craft distinctly appears in Section 4233, Revised Statutes, Rule 12: 'Coal-boats, trading-boats, rafts, or other water craft.'"

In Fifty Thousand Feet of Timber, 2 Lowell, page 64, the Court held that a claim for salvage may be maintained in a court of admiralty for saving a raft of timber. To

the same effect is A Raft of Spars, 1 Abbott's Admr. 485, and Bywater v. A Raft of Piles, 42 Fed. Rep. 917; Whitmire v. Cobb, 88 Fed. Rep. 91.

In The New York, 93 Fed Rep. 495, it was held that a barge without means of self propulsion is subject to a maritime lien for breach of a contract of hiring to the same extent as any other vessel. We take it, the law deduceable from the decisions is, that a contract of towage, whether it be of a steamer, boat, barge or raft, is a maritime contract, and, upon the performance of such contract, when the work, or towage, has been done, that there is a lien for such work upon the vessel or raft. The Appellate Court of the State of Illinois, in rendering its decision in this case, by Dibell, J., after citing decisions on both sides on this point, uses this language:

> "Perhaps the sounder argument supports the position that such a raft on a navigable river is a proper subject of admiralty jurisdiction."

The Supreme Court of the State of Illinois, on appeal, concurred in the opinion of the Appellate Court, and adopted the opinion of that Court as its own, thus agreeing with the Appellate Court that the sounder argument supports the position that a raft on a navigable river is a proper subject of admiralty jurisdiction; therefore, it conclusively follows that if a raft is the subject of admiralty jurisdiction, that such a contract as was made in this case, for the towage of a raft, is a maritime contract, and McCaffrey, having towed all the raft from Stillwater, Minnesota, to Boston Bay, and half of the raft from Boston Bay to St. Louis, that he had a maritime lien against the raft for such towage.

II.

The contract being maritime, to enforce the lien for towage of the raft, the United States Admiralty Courts have exclusive jurisdiction, not only of Federal Courts, but of all State Courts.

How is this lien given by this maritime contract enforced?

In the Constitution of the United States, by Sec. 2, of Art. 3, it is provided that:

> "The judicial power of the United States shall extend to all cases, in law and in equity, arising under this constitution, * * * to all cases of admiralty and maritime jurisdiction."

Congress passed the Judiciary Act in 1789, by which the first Courts of Admiralty were established, and by which it was provided that the District Courts of the United States "shall have exclusive cognizance of all causes of admiralty and maritime jurisdictions," etc.; "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

This section has been incorporated in every revision that has been made of the statutes of the United States, and is to be found in the revision of 1878 in chapter 3, page 95, par. 8, of section 363.

The Supreme Court of the United States in the case of the "Genesee Chief," 12 How. 443, held that the United States District Courts had jurisdiction over cases upon the lakes and navigable waters of the United States. In this suit it was claimed that the propellor Genesee Chief ran into the schooner Cuba and injured her while she was on a voyage on Lake Ontario. The owners of the Cuba filed a libel against the Genesee Chief, and its owners, in the United States District Court for the Northern District of New York. It was claimed the Court had no jurisdiction, because the collision did not take place on the high

seas, tide water rivers, etc. The District Court held in favor of jurisdiction; this, on appeal, was affirmed in the United States Circuit Court, and also affirmed by United States Supreme Court, Chief Justice Taney, on page 457, using this language:

> "It is evident that a definition that would at this day limit public rivers in this country to tide water rivers, is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And, certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

This decision has been followed by numerous decisions of the United States Supreme Court, to some of which we refer the Court under Point II. of our brief. In Hine v. Trevor, 4 Wall., p. 568, the Court uses this language, viz.:

> "It must be taken, therefore, as the settled law of this Court, that wherever the District Courts of the United States have original cognizance of admiralty causes, by virtue of the Act of 1789, that cognizance is exclusive, and no other Court, State or National, can exercise it, with the exception always of such concurrent remedy as is given by the common law."

In The Glide, 167 U. S. 606, the point decided was that the enforcement *in rem* of the lien created upon a vessel by the Public Statutes of Massachusetts, for repairs and supplies in her home port, is exclusively within the admiralty jurisdiction of the Courts of the United States. Justice Gray, who delivered the opinion of the Court, reviewed and considered all the previous decisions on this question of jurisdiction, and said:

"In conclusion, the considerations by which this case must be governed may be summed up as follows: The maritime and admiralty jurisdiction conferred by the Constitution and laws of the United States upon District Courts of the United States is exclusive. A lien upon a ship for repairs or supplies, whether created by the general maritime law of the United States, or by a local statute, is *a jus in re*, a right of property in the vessel, and a maritime lien, to secure the performance of a maritime contract, and therefore may be enforced by admiralty process *in rem* in the District Courts of the United States. When the lien is created by the general maritime law, for repairs or supplies in a foreign port, no one doubts at the present day that, under the decisions in the *Moses Taylor* and *The Hine*, 4 Wall. 411, 555, above cited, the admiralty jurisdiction *in rem* of Courts of the United States is exclusive of similar jurisdiction of the Courts of the State. The contract and the lien for repairs or supplies in a home port, under a local statute, are equally maritime, and equally within the admiralty jurisdiction, and that jurisdiction is equally exclusive."

We take it that the contract and lien for repairs and supplies is no greater, or no different, than the contract and lien for towage; that the lien in each case is maritime; that in each case admiralty has jurisdiction, and in each case that jurisdiction is exclusive.

The decisions of the United States Supreme Court hold, *first*, that the jurisdiction of the Admiralty Courts of the United States is exclusive; and, *second*, that the jurisdiction of said courts extend to the entire navigable river system of the United States; and as the Mississippi River is a navigable river, and the contract for towage on it was a maritime contract, it follows that to enforce the lien given for towing that raft under the contract the Admiralty Courts of the United States alone had jurisdiction.

In the revision of the United States laws, made in 1878, it was expressly provided in Sec. 711, Chapt. 12, p. 139, as follows:

> "The jurisdiction vested in courts of the United States in the cases and proceedings hereinafter mentioned shall be *exclusive* of the courts of the several States (par. third); of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it."

This saving clause was in the first statute passed in 1789, and has remained ever since on the statute book. Was McCaffrey in this suit pursuing a common law remedy? What is a common law remedy?

Keeping in view that the language of the saving clause in the statute is the right of *a common law remedy*, let us ascertain what remedies are enforced by the common law. How is common law defined?

> "The body of rules and remedies administered by courts of law, technically so-called, in contradistinction to those of equity and to the cannon law." (Bouvier.)

Rapalje & Lawrence, in their dictionary, thus define it:

> "In the widest sense of the word, the common law is that part of the law of England which, before the Judicature Acts, was administered by the common law tribunals, especially the former Courts of Queen's Bench, Common Pleas, and Exchequer, as opposed to Equity, or that part of the law of England which was administered by the Courts of Chancery."

Justice Daniel, in Fenn v. Holme, 21 How. (U. S.) 481, on page 486, quotes approvingly from the opinion in Parsons v. Bedford *et al.*, 3 Peters, the following language, viz.:

> "The Constitution had declared, in the third article that the judicial power shall extend to all cases *in law*,

and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority, etc. It is well known that in civil suits, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved at common law, the natural conclusion is, that the distinction was present in the minds of the framers of the amendment. By *common law* they meant what the Constitution denominated in the 3d article *law*, not merely *suits* which the common law recognized amongst its old settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *'equitable rights* alone were recognized and equitable remedies administered.'"

In Bennett v. Butterworth, 11 How. (U. S.) 669, the Chief Justice used this language:

"The adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity, and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State courts. But if the claim be an equitable one, he must proceed according to the rules which this Court has prescribed, regulating proceedings in equity in the courts of the United States."

In the State of Illinois the distinction between actions at common law and suits in equity have always been observed. The Constitution of the United States, in creating and defining the judicial power of the General Government, preserves the same distinction, the Court rules, and the practice in the Federal Courts maintain it,

and the decisions of the Supreme Court of the United States uphold it. Chief Justice Fuller thus expresses it in Green v. Mills, 25 U. S. Appeals, p. 394:

> "The jurisprudence of the United States has always recognized the distinction between common law and equity under the constitution, in matters of substance as well as of form and procedure; and the distinction has been steadily maintained, although both juris dictions, are vested in the same courts. Fenn v. Holme, 21 How. 481, 484; Thompson v. Railroad Companies, 6 Wall. 134; Cates v. Allen, 149 U. S. 451; Mississippi Mills v. Cohn, 150 U. S. 202, 205."

And the test of equity jurisdiction in the courts of the United States, namely: the adequate remedy at law—is the remedy which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Congress; and is not the existing remedy in a State or Territory by virtue of local legislation; McConihay v. Wright, 121 U. S. 201. Therefore when the ninth section of the Act of 1789, which created courts of admiralty, and giving to such courts exclusive jurisdiction, saved to suitors in all cases the right of a *common law* remedy; where the common law is competent to give it, it means only a remedy given by common law as distinguished from an equitable remedy, and does not include an equitable remedy.

In the Moses Taylor, 4 Wall. p. 411, the facts are that in 1863 the steamboat Moses Taylor was engaged in the Pacific Ocean in carrying passengers and freight between Panama and San Francisco. The owner of the steamer made a contract to transport one Hammons for $100. For an alleged breach of the contract, on arrival at San Francisco, suit was brought before a justice of the peace against the steamer under a statute of California, which provided that steamers, vessels, etc., shall be liable for the "non-performance of any contract for the transportation of persons or property made by their respective

owners," etc. The agent of the vessel answered, claiming the Court had no jurisdiction. The justice decided he had, and rendered judgment for plaintiff On appeal to the County Court, the judgment was affirmed. The judgment of the County Court, on account of the amount involved, was conclusive, so far as the State Courts were concerned. A writ of error was taken from the County Court to the United States Supreme Court, which held that the United States Courts alone had jurisdiction, and directed the suit to be dismissed. It was contended in that Court that the proceedings in the State Court fell within the exception contained in the Judiciary Act of 1789, saving suitors a common law remedy, etc. Justice Field, in the opinion, uses this language on page 431, viz.:

> "The case before us is not within the saving clause of the ninth section. That clause only saves to suitors 'the right of a common law remedy when the common law is competent to give it.' It is not a *remedy* in the *common law courts* which is saved, but a common law remedy. A proceeding *in rem*, as used in admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts it is given by statute."

In Morgan v. Sturges, 154 U. S. 256, where a suit was brought to dissolve a corporation, a receiver was appointed. Afterwards libels were filed in the United States District Court by seamen for wages, and the marshal took possession of some of the boats. The receiver enjoined the marshal from selling, which judgment was affirmed in the Supreme Court and in the Court of Appeals of New York. On writ of error to the United States Supreme Court, it held that the United States District Court had exclusive jurisdiction, and the judgment of the State Court was erroneous, and the marshal had the right to retain the property.

Chief Justice Fuller, on page 276, uses this language:

"But the question in the case at bar arises in respect of the State Court and a District Court of the United States, whose cognizance of all civil cases of admiralty and maritime jurisdiction is, under the Constitution and by the ninth section of the Judiciary Act of 1879 exclusive.' New Jersey Steam Nav. Co. v. Merchants Bank of Boston, 47 U. S. (6 How.) 390; The Moses Taylor v. Hammons, 71 U. S. (4 Wall.) 411; The Ad. Hine v. Trevor, 71 U. S. (4 Wall.) 555; Rodd v. Heartt ("The Lottawanna"), 21 Wall. 558; Johnson v. Chicago & P. Elev. Co., 119 U. S. 388; The J. E. Rumbell, 148 U. S. 1. As said Mr. Justice Miller: 'It must be taken to be the settled law of this Court, that wherever the District Courts of the United States have original cognizance of admiralty causes, by virtue of the Act of 1789, that cognizance is exclusive, and no other court, State or National, can exercise it, with the exception always of such concurrent remedy as is given by the common law.' 71 U. S. (4 Wall.) 568. The act saves to suitors in all cases "the right of a common law remedy, where the common law is competent to give it;" that is, not a remedy in the common law courts, but a common law remedy. Suitors are not compelled to seek such remedy, if it exist, nor can they, if entitled, be deprived of their right to proceed in a court of admiralty, and the State Courts have no authority to hear and determine a suit *in rem* to enforce a maritime lien. The Belfast v. Boon, 74 U. S. 624; Bird v. Josephine, 39 N. Y. 19. 'A statutory proceeding to wind up a corporation is not a common law remedy, and a maritime lien cannot be enforced by any proceeding at common law.'"

It was contended by counsel for McCaffery in the Appellate and Supreme Courts of the State of Illinois, that McCaffery had a common law lien—the lien of a bailee; that he could enforce the lien in two ways, either by a libel in the Admiralty Courts, or by foreclosing the lien in equity. We contended that he could no have both a mari-

time lien and a common law lien; that his lien was the former and not the latter, and even if the latter, it was only a passive lien, the mere right to retain the possession, and such a lien was not enforcible in equity. To sustain our position, we relied upon the following authorities:

Benedict on Admiralty, Sec. 290;
Jones on Liens, Secs. 22, 21, 335, 1038;
Buggo v. Boston & Lowell R. R. Co., 6 Allen, 246–252;
Meaney v. Head, 1 Mason (U. S.) 319;
I. & St. L. R. R. Co. v. Hemdon, 81 Ill. 143;
Doane v Russell, 3 Gray, 382;
Hunt v. Haskell, 24 Me. 339;
Amer. & Eng. Ency. of Law, Vol. 13, p. 576;
The Thames Iron Works and Ship Building Co. v. Patent Derrick Co., 29 Law Journal (Ch.) 714.

This last case is directly in point and is a case of great hardship. The Appellate and Supreme Courts of Illinois, in order to retain jurisdiction of the suit, decided the lien was a bailee's lien, and it could be enforced in equity.

If we are correct that the lien for towage in this case is a maritime line, then in the language of Chief Justice Fuller "a maritime lien can not be enforced by any proceeding at common law." It is a well established doctrine that legal and equitable remedies are different, and that equity cannot enforce a common law right, if there is complete and adequate remedy at law. The statute was never intended to save the enforcement of a common law right by a remedy in equity. It is only a common law remedy that is saved.

Now, what is the object of this suit? The prayer in the bill clearly shows this. The prayer is for: First, that defendants answer. Second, that complainant "may be decreed to have a first lien on said half-raft No. 1" for the amount due him. Third, that the defendants be required to pay said amount by a certain day. Fourth, in default thereof, the raft to be sold to pay the amount due com-

plainant, and such sale convey to the purchaser the absolute title, etc. There is no personal decree prayed for against the defendants, or any of them, for the amount due, no judgment as to them, merely a finding of the amount due for which the lien is claimed, and a sale of the property if not paid. There could be no personal decree against any of the defendants, except the Schulenburg & Boeckeler Lumber Company, and they were insolvent. The prayer is somewhat similar to that in a bill to foreclose a mortgage. It is a proceeding, in all intents and purposes, against the thing, the raft, asking that a lien be established, and the raft sold. If the Court decreed as prayed for in the bill, McCaffrey would have obtained the same relief he could have had by a libel in admiralty.

We have shown that this contract is a maritime contract, and that to enforce the lien which the law gives in such cases, the Admiralty Courts of the United States have exclusive jurisdiction, and the State Court could not enforce the same, unless in so doing, the complainant was pursuing a common law remedy. We have shown that the distinction between common law and equity is maintained in this State and in the Federal Courts; and this suit being in equity, the complainant is not pursuing a common law remedy, does not bring himself within the exception or saving clause, and therefore the State Court had no jurisdiction.

III.

The plaintiff in error has omitted nothing it should have done, or done anything which prevents it from insisting that the State Courts had no jurisdiction of this suit.

Let us examine the status of the case. On the 19th of February, A. D. 1895, the bill in this suit was filed in the Circuit Court of Mercer County, Illinois. The bill stated complainants' claim, alleging the claim was based upon

towing the raft from Stillwater, Minnesota, to Boston Bay Harbor, and half the raft from there to St. Louis, Missouri, and that he was in possession of the other half of the raft in Boston Bay Harbor; the bill then alleged that Schulenburg & Boeckeler Lumber Company claimed the said half raft had been sold to the Knapp, Stout & Co. Company and the Knapp, Stout & Co. Company claimed it owned the raft, and intended to take forcible possession of the half raft on the opening of navigation. The bill alleged that the half raft was attached to the shore within two yards of the open channel of the Mississippi River, and it would be ruinous, financially, to complainant, for him to keep a force of men large enough to defend the possession of said half raft against said Knapp, Stout & Co. Company from the time navigation opened in the spring, until this suit would be determined. It was further alleged, that in its present position it would be in great danger of being torn to pieces, destroyed, lost and carried away by what is called the June rise in the Mississippi River. The bill was sworn to (Printed Transcript of Rec., pp. 17 and 19), but a sworn answer was waived. At the March Term of Court, the complainant moved the Court to appoint a receiver to hold the half raft pending the determination of the suit. The Knapp, Stout & Co. Company was not served in the suit, but when informed of the pendency of said motion, filed a counter motion in reply to said motion in which this language was used:

And now comes the defendant, the Knapp, Stout & Co. Company, and appearing for the purpose of this motion only, and expressly limiting its appearance to such purpose and in nowise entering its general appearance herein, on admitting that this Court has jurisdiction over the subject matter in controversy in said suit, to-wit: The raft mentioned in the bill of complaint, but protesting that this Court has no jurisdiction

thereof, objects to the Court appointing a receiver for the raft, and moved the Court for the reasons therein given (Printed Transcript of Rec., pp. 20, 21, 22) to require McCaffrey to give a bond in the sum of $25,000, conditioned that he shall pay unto Knapp, Stout & Co. Company whatever damages it may suffer by McCaffrey holding the raft, in case this Court or any other Court shall decide that it has not jurisdiction of the suit, or that McCaffrey has no lien and no right to hold the said raft.

It also provided that in case McCaffrey would not give a bond that the said Knapp, Stout & Co. Company was willing to enter into bond in the sum of $6,000 and take the raft.

Prior to the filing of the motion, if the parties had met and agreed that the Knapp, Stout & Co. Company were to enter into a bond of $6,000, conditioned to pay to McCaffrey whatever sum (if any) the court of final resort might decree was due him in this suit, and upon the delivery of the bond the Knapp, Stout & Co. Company were to take the raft; and it was distinctly understood that the Knapp, Stout & Co. Company should have the right to claim the Court had no jurisdiction. We apprehend that such action by the parties. if done by agreement or consent, either prior to the making of the motion or while pending, would not prevent the Knapp, Stout & Co. Company from insisting that the Court had no jurisdiction of the subject matter.

Now, what was done? Just that very thing. The order that was entered by the Court was not that a receiver be appointed, as prayed in the motion, but the order that was made was made only by *the consent of the parties;* in other words, the parties agreed to it, and by agreement, by consent of parties only, the Court entered the order, and by that agreement, and by the terms of the order the Knapp, Stout & Co. Company had the right to insist that the Court had no jurisdiction of the suit.

Both parties claimed the raft, and each claimed to have possession. The Knapp, Stout & Co. Company claimed that, after it had purchased the raft with the distinct understanding that McCaffrey had no claim or lien on it, and after its watchman had possession of the raft, McCaffrey, after learning of the assignment of Schulenberg & Boeckeler Lumber Company, had put men on the boat, which was wintering along side of the raft, and claimed possession. McCaffrey insisted he had never surrendered the possession of the raft. If McCaffrey held on to the raft, was beaten in the suit, and the raft should be destroyed, he would be liable to heavy damages. It was certain that the Knapp, Stout & Co. Company owned the raft, and it was certain that McCaffrey, at most, had only a claim on the raft, which did not exceed one-fourth of its value. McCaffrey, therefore, was willing that the Knapp, Stout & Co. Company should give him a bond conditioned to pay him whatever claim he might, in this suit, or in any other suit, ultimately succeed in proving against the raft. The parties agreed to this, and also agreed that the giving of such bond was not considered by either party a waiver of any of its rights; but all the rights of the parties, including the right of the Knapp, Stout & Co. Company to object to the jurisdiction of the Court, was expressly reserved, and it was agreed that the Court was to enter such an order, which was done. How does the order read?

> "And now, upon consideration of such motion and cross-motion, the Court, upon consideration thereof, *and by the consent of the parties*, orders and adjudges, that the Knapp, Stout & Co. Company enter into a penal bond in the sum of $6,000." (See order, Printed Transcript of Rec., pp. 52, 53 and 54.)

This order, made by *consent of parties*, by agreement, and it providing that *all the rights of the parties* hereto, including the *rights of the defendant* (the Knapp, Stout & Co. Company

the only defendani affected by the order), *to object to the jurisdiction of the Court, is hereby expressly reserved.* Could language be made clearer as to what was the intention of the parties? Could the Court have expressed the intention of the parties more plainly?

In construing a contract or a will, or any written document, the fundamental principle is to ascertain the intention of the parties, and how? By the language used in the writing, and when the intention is ascertained the courts then carry out and enforce that intention. Taking the language used in this order of court, which was entered by consent, is it not absolutely certain that it was the intention of the parties and the Court, that the Knapp Stout & Co. Company should have the right to object to the jurisdiction of the Court? That that right had not only not been waived, but it was expressly provided that that right was reserved. To contend otherwise would be a violation of the agreement, of the express terms of the order, and in thename of justice, and in a court of justice, be perpetrating a wrong upon the Knapp, Stout & Co. Company; it would be depriving them of a right they never waived or surrendered. The Knapp, Stout & Co. Company gave the bond conditioned as provided in the order of Court (Printed Transcript of Rec., pp. 22, 23.) The Knapp Stoup & Co. Company then filed its answer (Printed Transcript of Rec., p. 31, etc.), which began as follows:

> "This defendant protesting and insisting that it should not be required to answer the complainants, bill of complaint, because the Court has no jurisdiction of the subject matter in this suit for the reason that the matter in controversy is a matter of which the United States Admiralty Courts have sole and exclusive jurisdiction, and this Court has no jurisdiction to decree a lien as is prayed for in complainant's, bill, and this defendant, although hereafter answering

the bill filed in this suit, does not thereby waive or intend to waive the right in the hearing hereof to claim and insist that this Court has no jurisdiction, as above stated."

On the hearing in the Circuit Court the point of jurisdiction was understood by counsel and Court as one of the vital points in the case, was fully argued, and the Court decided that it did not have jurisdiction.

McCaffrey appealed to the Appellate Court, and that Court held that the Circuit Court of Mercer County, Illinois, had jurisdiction, holding that the Knapp, Stout & Co. Company could not raise that question after the giving of the bond, and quote the cases of Johnson v. Chicago and Pacific Elevator Co., 119 U. S. 388; Gindele v. Corrigan 129 Ill. 582; 28 Ill. App. The Court says:

> "The order provided with great care that no one should be prejudiced by the order—that it should not be construed to be a confession of anything by anybody, nor an admission that the Court had jurisdiction, etc. Nevertheless, the order was much to the detriment of McCaffrey, and took from him important rights."

The Court does not enlighten us as to what were the important rights the order took from McCaffrey. McCaffrey would never have consented to have a single right, much less "important rights," taken away from him. Yet he consented to the order; agreed to it. In fact, the order, as agreed on, was to the advantage of McCaffrey, as it relieved him of the responsibility of keeping the raft, and gave him a good bond in its place, which assured him the payment of any claims he could substantiate in that suit, or in any other suit, or on the bond itself. The Court, in claiming jurisdiction, admits it does so in violation of the terms of the order, and refuses to carry out the intention of the parties who made the order.

Let us examine the cases referred to by the Court, and which were relied on by McCaffrey's counsel: In Gindele v. Corrigan, 129 Ill. 528, the suit was brought under the "Water-Craft Act" against the canal boat "Nunnemacher." It was alleged the Nunnemacher, through the carelessness of the persons in charge of her, ran into the canal boat "Midnight" and sunk her. Suit was brought in attachment by Corrigan, the owner of the "Midnight," as provided by the Water-Craft Act, and the Nunnemacher was seized by the sheriff under the attachment writ. John A. Gindele, as part owner of the Nunnemacher, bonded and released the boat under Sections 15 and 17 of said Act, and the canal boat was discharged from the attachment.

The plaintiff then amended his petition, making Gindele and the sureties on the bond defendants. The suit was contested and judgment rendered against the defendants, personally. The defendants contended that the Court had no jurisdiction, that the jurisdiction was alone in the Admiralty Courts of the United States.

Section 15 provided that any owner or person interested in the water craft, desiring a return of the water craft, which was attached, could file with the clerk of the court in which the suit is pending a bond to the parties who filed the petition in a penalty double the sum alleged to be due, conditioned, that the obligors will pay all money adjudged to be due the claimant, with costs of suit.

Section 17 provided that upon the clerk receiving the bond, he shall issue a writ of restitution, and the water craft be discharged from the attachment lien.

Section 21 provided that upon trial, if judgment shall pass for the petitioner, the judgment shall be rendered against the principal and sureties on the bond.

The Court held that it had jurisdiction, and based it upon two reasons: *First*, that the plaintiff was pursuing a common law remedy; *second*, that the suit after the bond was given was, *in personam*, against the defendants, and a

personal judgment has to be rendered against them. By giving the bond under the statute they agreed, first, to be made defendants in the suit; second, to pay personally any judgment that might be rendered against them. Suppose the statute had provided that the giving of the bond did not take away the right of the defendants to contest the jurisdiction of the Court, would the Court have decided they could not raise that question? If the statute had in it such a provision, then that provision would have been similar to the order of Court in this case. Again, by the very terms of the statute, the bondsmen are made defendants to the suit, and a personal judgment could be rendered against them. No judgment could have been rendered against the Knapp, Stout & Co. Company in this suit. There is no similarity between the cases either upon the facts or the law governing them. We doubt under the decision of The Glide, *supra*, if the state courts have jurisdiction under such statutes as the Water Craft Act, where the suit is properly contested.

The case of Johnson v. The Chicago Elevator Co., 119 U. S. 388, was another suit in attachment under the Water-Craft Act of Illinois. The facts are very similar to the case of Gindele v. Corrigan, except that an elevator on shore was damaged by the collision, instead of a canal boat. This Court held that the cause of action was not a maritime tort, the substance and consummation of the wrong having taken place on land, and not on navigable water; also, that the suit was *in personam* was a proper one because it was a common law remedy.

Complainant could have brought suit under the Water-Craft Act of the State of Illinois, and attached the raft, and have thus pursued a common law remedy; or he could have proceeded by attachment against the defendants on the ground of non-residence, and pursued a common law remedy, as this Court has decided; but he did not do so.

He brought an equitable suit to foreclose a lien, which is not a common law remedy.

The case of Leon v. Galceron, 11 Wall. 185, is, in principle, very similar to the above cases. By the Statute of Louisiana a mariner had a lien on his vessel for his wages; he brought suit *in personam* therefor, in a State court, and had the vessel sequestered. She was released by the owner by giving bond, with Leon as surety. Judgment was rendered against the owner *in personam*, and the vessel not being returned, the mariner sued the surety on the bond, in the same court, and obtained judgment. On writ of error to this Court, sued out by Leon, it was urged for him that the State court had no jurisdiction to enforce the lien by a seizure before judgment. This Court held that the action was *in personam*; that the State court had jurisdiction, because the plaintiff was pursuing a common law remedy.

In none of these cases were parties endeavoring to enfore or foreclose a lien. They were suing *in personam* for a debt, and attaching property to secure the debt. In this case the complainant claimed a lien upon a maritime contract, a maritime lien, which cannot be enforced by any proceeding at common law. This proceeding in equity is not a common law remedy. The Knapp, Stout & Co. Company appealed from the judgment of the Appellate Court to the Supreme Court of Illinois, which Court adopted the opinion of the Appellate Court and affirmed its judgment, holding the State Court of Mercer County had jurisdiction, and the question, after being presented in all these courts, is now presented to this Court.

If we are right in our premises, the conclusion follows that the State courts had no jurisdiction of this suit. McCaffrey had no reason to go into equity. He should have either towed the raft to St. Louis, or permitted the Knapp, Stout & Co. Company to have done it, and when

there, have proceeded in the proper forum, the Admiralty Court of the United States, by bringing a libel suit against the raft.

The Knapp, Stout & Co. Company in its cross-motion, insisted the State Court had no jurisdiction, and it was agreed by the parties that it could raise that question on the trial of the suit, and the Court so entered it in the order agreed to by the parties. It then raised it in the answer and all through in this suit; it not only not waived it, but always insisted on it, consequently has now the right to here raise the question, and having that right, and having shown that the State Courts had not jurisdiction, should not the decree rendered in the State Courts be reversed?

CHAS. P. WISE,

Attorney for Plaintiff in Error.

No. 263.

By. of Kremer & Scott for D. E.

Filed April 9, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

THE KNAPP, STOUT & CO. COMPANY,
Plaintiff in Error,

vs.

JOHN McCAFFREY,
Defendant in Error.

No. 263.

In Error to the Supreme Court of the State of Illinois.

Statement, Brief and Argument for Defendant in Error.

CHARLES E. KREMER and
GUY C. SCOTT.
For Defendant in Error.

Geo. Ohrnstein & Co., Printers, Chicago.

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Statement, Brief and Argument for Defendant in Error.

STATEMENT.

The bill filed herein in the Circuit Court of Mercer County, Illinois, was to establish and enforce the ordinary lien of the bailee for his hire.

John McCaffrey, a resident of Davenport, Iowa, under his contract to tow lumber on the Mississippi river from Stillwater, Minnesota, to St. Louis, Missouri, for the Schulenburg & Boeckler Lumber Com-

pany (hereinafter referred to as the Schulenberg Company), on October 13, 1894, took possession of a raft, being the tenth raft of that season and known in this litigation as raft No. X belonging to that company and towed it from Stillwater, Minn., to Boston Bay Harbor in Mercer County, Illinois. Before reaching there the company had requested him to divide the raft and bring one half of it down as soon as possible. For the purpose of making better time with the remaining half of the raft, he there, on October 26, 1894, divided the raft and laid up one half of it, known as half raft No. 1 in that harbor, and employed one Ed L. Willits, who was the harbor watchman and not in the employ of the Schulenburg Company, to watch the same. That half raft remained there in Boston Bay in McCaffrey's possession until April 16, 1895, when he surrendered it to the Knapp, Stout & Co. Company (hereinafter referred to as the Knapp Company) in pursuance of a decree made herein on the petition of that company. On February 19, 1895, McCaffrey had filed the bill herein to enforce his lien, as the Knapp Company before that time, claiming to be the owner of the half raft in question by purchase, had forbidden him to tow it to St. Louis and threatened to deprive him of possession thereof. On October 26, 1894, after laying half raft No. 1 in Boston Bay, McCaffrey's steamer, the Robert Dodds, George Tromley, Jr., captain, which was towing the raft, proceeded with the remaining half of the raft known as half raft No. 2, to St. Louis, and there delivered it to the Schulenburg Company on November 2, 1894. The steamer immediately returned to Boston Bay, reaching there on the morning of Sunday,

November 4, 1894. The crew, in accordance with McCaffrey's directions, set the boat into the side of the half raft and made both secure to the shore for the purpose of leaving them in the harbor through the Winter, as the Schulenburg Company did not desire that half raft No. 1 be delivered until the next Spring. The captain of the steamer on the same day, November 4, 1894, employed said Willits, who was the harbor watchman, to watch the boat and raft through the Winter for McCaffrey. On the next day, November 5, 1894, the Schulenburg Company made a bill of sale for this half raft No. 1 to The Knapp Company, at St. Louis, for an expressed consideration of $15,000, but the possession was not delivered. When McCaffrey learned of the assignment made on November 9, 1894, by the Schulenburg Company, he went at once to St. Louis and learned from that company that it claimed to have sold the half raft in Boston Bay to the Knapp Company; he then called on the latter company on November 13, 1894, and informed John H. Douglas, manager of the company, that he was in possession of that half raft, and proposed to hold it for his claim for running the entire raft. Douglas denied McCaffrey's possession, and ordered him to keep away from the half raft. McCaffrey said he had a contract to run the raft to St. Louis, and proposed to do it. Douglas told him not to do it, that the Knapp Company would run the raft itself. And after some further controversy about who was in possession of the half raft, McCaffrey came away. Printed transcript, page 111 and page 196.

Thereafter, on February 19, 1895, McCaffrey filed the bill herein, making the two lumber companies and

the assignees of the Schulenburg Company defendants, setting up the contract and the facts as they are above stated and claiming a lien on half raft No. 1 for the entire towage and charges on raft No. X, averring that the Knapp Company maintained a large force of men and steamers on the Mississippi River, and was threatening to deprive him of that half raft by force; that in its then present position the half raft was within two hundred yards of the open channel of the Mississippi River, and was in danger of being swept away by high water in the Spring, and that it should be moved farther inland; that his right to move it was denied, and that it would be ruinous financially for him to maintain a sufficient force of men to defend his possession against the Knapp Company. The prayer of the bill asks in the usual form that defendants be required to answer without oath and continued as follows: "And that your orator may be decreed to "have a first lien upon said half raft No. 1, and the "material deck loaded thereon, for the amount due "him as aforesaid, and that the defendants may be "decreed to pay to your orator the amount so due "him with interest and costs by an early day to be "fixed by the court, and that in default of such pay- "ment said half raft, with the material deck loaded "thereon, or so much thereof as may be necessary, "shall be sold by such officer of the court, and in such "manner as the court shall direct, to satisfy the "amount then due your orator and costs, and in case "of such sale the purchaser or purchasers shall have "an absolute title to such property, free from all "equity of redemption, and all claims of any kind by "or on the part of any of the defendants, and that the

"defendants and all persons claiming through or under "them subsequent to the beginning of this suit, may "be barred of any right to or interest in such portion "of such property as may be sold pursuant to the de- "cree of this court, and that your orator may have "such other and further relief in the premises, both of "a general and special nature, as to equity may apper- "tain and to your Honor may seem meet." (Printed transcript, page 18.)

Aside from the amount due from Schulenburg Company to McCaffrey for towing raft No. 10 there is due him from that company many thousand dollars, all of which was due when the bill was filed.

At the succeeding March term, 1895, of the Circuit Court McCaffrey, basing his motion on the averments of the bill, moved for the appointment of a receiver.

The Knapp Company then entered an appearance which it termed a special appearance, but which in fact was a general appearance, as it sought thereby to obtain affirmative relief, and filed what is termed a cross motion, but which in reality is a petition in the alternative, invoking the aid of the court, asking that McCaffrey either be required to give bond to save the Knapp Company harmless on account of any damages that might come to the raft by reason of McCaffrey's continued possession thereof, or that McCaffrey be required to surrender the half raft to the Knapp Company upon its entering into bond to pay any lien McCaffrey had upon the half raft, and then the so-called cross motion contains this language, "and the de- "fendant, being in a court of equity and believing "that it is but right that this motion should be

"granted, prays the court to grant the same." This cross motion avers that the half raft is worth at least $17,000. (Printed Transcript, 21.)

There is no warrant in the record nor in fact for the statement made by counsel for appellant, that prior to the filing of the cross motion the parties had met and agreed that the Knapp Company was to enter into a bond of $6,000, conditioned to pay McCaffrey whatever sum the court of final resort might decree was due him in the suit, and upon the delivery of the bond the Knapp Company was to take the raft. Not only is there nothing in the record to warrant any such assertion, but it conclusively appears that the facts are otherwise from the fact that the motion entered by the Knapp Company was in the alternative, which would not have been the case had there already been an agreement in regard to the disposition that was to be made of the raft.

The court then entered a decree which recites that it is made on consideration of the motion for the appointment of a receiver and of the cross motion, "and by consent of the parties." The decree, while it provides that all "the "rights of the parties hereto, including the "right of defendant to object to the jurisdiction of this "court, are hereby expressly reserved," still provides that McCaffrey "shall surrender the property above "described to Knapp, Stout & Co. Company" upon the company giving *bond in the penal sum of $6,000, to pay any lien which McCaffrey might have upon said half raft, whether the same be established in the suit then pending or in any other suit which might be*

brought against the Knapp Company or in a suit on such bond.

On April 13, 1895, the Knapp Company filed a bond in accordance with this decree, and on April 16, 1895, McCaffrey delivered the possession of the half raft in question to the Knapp Company, which by the steamer Saturn at once took it away.

At the August term, 1895, of the Mercer County Circuit Court, all the defendants answered. The two lumber companies answered separately and the two assignees of the Schulenburg Company answered jointly.

Each of the answers denies the jurisdiction of the Circuit Court of Mercer County, and avers that exclusive jurisdiction is vested in the United States Courts in Admiralty. Each of the companies averred the sale of November 5, 1894, to the Knapp Company, and that when McCaffrey laid half raft No. 1 in Boston Bay he delivered it to the Schulenburg Company which in turn delivered it to the Knapp Company. The Knapp Company also denies that McCaffrey had ever been in possession of the half raft at any time; denies that he owned the steamer Robert Dodds and averred that the Knapp Company at all times after November 7, 1894, had been in possession of said half raft, and that whenever it desired to remove the same it would have done so; denied that McCaffrey had any right to move the raft to a place of greater safety and averred that McCaffrey only claimed a lien because he feared he would lose his claim against the Schulenburg Company, "and because he does not like the "manager of this defendant, one John H. Douglas," and desires to annoy defendant by this suit.

The assignees, by answer, denied all the averments of the bill, including that of the alleged sale by the Schulenburg Company to the Knapp Company. It also appeared from the answers of the assignees that McCaffrey had filed a claim against them for $24,558.39, including the amount due for towing raft No. X, but reserving the right to prosecute his claim for lien on the half raft in Boston Bay.

Replications were filed and on a hearing a decree was rendered at the March term, 1897, by the Mercer County Circuit Court, dismissing the bill without prejudice on the ground that exclusive jurisdiction of the subject-matter was vested in the United States Courts in Admiralty.

McCaffrey appealed to the Appellate Court of the Second District of Illinois, and that court at the December term, 1897, reversed and remanded the cause with directions to enter a decree in McCaffrey's favor for $3,643.17 and interest, the court holding that he had a a lien on half raft No. 1 for that amount, which was the sum due for the towage of the entire raft No. X. The Knapp Company alone prosecuted an appeal to the Supreme Court of the state, where, at the February term, 1899, the Appellate Court was affirmed and that company now brings the case to this court.

The pleadings presented several issues of fact, the most important being whether McCaffrey delivered the half raft No. 1 to the Schulenberg Company, when he laid it up in Boston harbor. Every issue of fact has been by the state courts determined in favor of McCaffrey, as appears from the opinion of the Supreme Court of the state. (Printed transcript, pages 245 to 253.)

As stated by plaintiff in error in page 8 of its brief and argument, the sole question for determination in this court is whether or not the United States Courts of Admiralty have exclusive jurisdiction of this suit. Counsel, on page 26 of his brief and argument, contends that the lien of the bailee for hire is a passive lien, being merely the right to retain the possession of the property, and can not be enforced by any proceeding in court, and cites several authorities to support that position. In this case the Supreme Court of the state, in accordance with the weight of American authority, has decided that the lien of the bailee for hire can be enforced in equity, which settles that proposition so far as Illinois is concerned. We are at a loss to know why plaintiff in error makes any such contention here. The proposition presents no federal question.

It is asserted on the part of the Knapp Company that the lien is maritime and jurisdiction to enforce it is exclusively in the Admiralty Courts.

To this we reply:

First. The lien for the towage of the raft, if enforcible in admiralty at all, is of the same nature as the lien on cargo for carrying it. It is the common law lien of the bailee for his hire. It is a possessory lien, which, unlike the ordinary maritime lien, is defeated by the delivery of the property to which it attaches.

Second. McCaffrey has a lien by virtue of the common law and the maritime law, only in case he has possession. Having this he could enforce either lien, the common law in any court of the State of Illinois

provided with the proper jurisdiction, on the maritime lien by resorting to the Admiralty Court.

Third. Not being compelled to resort to the latter, he resorted to the former, and the procedure was strictly *in personam* in a court of common law employing the pleadings and procedure of a chancery court.

Fifth. The Knapp Company, having invoked the assistance of the Circuit Court of Mercer County, and having through it obtained the property upon which McCaffrey had a lien, and which was then in his possession, it deprived him of the opportunity of enforcing any lien he might have in the Admiralty Court by a proceeding *in rem*, and this suit thereafter became a mere suit *in personam*, to establish:

First. Whether McCaffrey had a lien; and,

Second. The amount which this lien secured.

The Knapp Company is therefore estopped from denying the jurisdiction of the said court.

Sixth. The facts in the case show grounds of equitable jurisdiction aside from the existence of the lien.

In the foregoing statement we have set forth such facts to supplement those stated by the plaintiff in error as are necessary to a clear understanding of the issues involved. Counsel, both in his statement and argument, makes certain assertions in reference to the facts in this case which we hold to be unwarranted by the record. We have not seen fit to call attention to the testimony which controverts those assertions for the reason that the issues of fact are all settled adversely to plaintiff in error by the opinion of the Supreme Court of the state in this case, to which we

have above referred this court, and we do not deem it necessary to go into the evidence for the purpose of controverting assertions which are at variance with the facts as found by that opinion.

BRIEF.

I.

If it be true that the contract for towing this raft of lumber from Stillwater to Boston Bay, Illinois, or St. Louis, Missouri, is a maritime contract, this does not of itself oust the Circuit Court of Mercer County, Illinois, of its jurisdiction to enforce the lien which McCaffrey had upon the raft for towing it as far as he did.

This raft of lumber was in no sense a vessel or vehicle of commerce. At best it was merely a commodity; property which could have been carried on a ship, and conveyed from place to place by water or land. It was cargo. It could not, therefore, be made the subject of such a lien as the maritime law gives upon a vessel in case of contract or of tort. It was not a vessel. It must be treated as cargo, as a commodity carried or conveyed, and whatever lien there may be attached to it was, if the contract was maritime, such a maritime lien as depended upon actual or constructive possession, and could not exist without this.

It can be likened only to the lien which the carrying ship has upon the cargo for freight. This lien, although a right of property, must be in all cases ac-

companied by possession. An unconditional delivery absolutely divests the property of its lien. This was so ordained so the merchant would not find his goods incumbered by secret liens of which he might have no knowledge, and which might amount to the full value of the goods long after they had left the decks of the ship.

That there is no maritime lien upon a raft except the same be cargo, or treated as cargo, or its equivalent, has been decided by the following cases:

Jones v. *Coal Barges*, 3 Wal. Jr., 53.
Toms v. *4 Cribs of Lbr.*, Taney's Dec., 533.
Gastrell v. *Raft*, 2 Woods, 213.
Raft of Cypress Logs, 1 Flippin, 593.

In the first three cases the libelants sought to enforce a lien for salvage against the rafts and temporary barges, and in the last libelants sought to recover for services in navigating the raft, and the court refused to entertain jurisdiction, claiming that a raft, although navigated upon navigable water of the United States from a place in one state to a place in another, could not be made the subject of a maritime lien for services rendered in its navigation.

This case is really directly in point, and a stronger case than we find here, for the reason that the propelling of the raft was in that case done by the men who manned, moved and steered it, and were really for the time being navigators rendering services upon navigable water upon a thing capable of carrying them while afloat, and which they were the means of transporting by their labor actually rendered on board.

In the case at bar the raft had no means of propulsion or way of being steered; had no master or crew, nor accommodations for the same, was not intended to carry anything, but was simply a congerie of boards and planks pushed before a steamer, rather than placed upon her decks. It was fit to be transported but not to be a transport.

In the case of *Cope et al.* v. *Vallette Dry Dock Co.*, 119 U. S., 625, the court held that salvage services rendered to a floating dry dock were not within the jurisdiction of a Court of Admiralty.

It was held in that case and the court says:

"A ship or vessel used for navigation and commerce, though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects and are capable of receiving salvage service."

This would necessarily exclude such property as was not mentioned within this definition.

If the property in question could not be made the subject of a salvage service, so that compensation therefor could be recovered in a Court of Admiralty, then the same property could not be proceeded against for a service of lesser merit, such as towage or labor performed in connection with its transportation or even salvage.

The question, therefore, that this raft was not subject to such a lien as is given by the maritime law upon a vessel, it seems to us is clearly settled by the principles announced in this case and the authorities citied in support of it.

In the case of "*The Kalorama*, 10 Wall., 395, the court defines the liens under the civil and the common law as follows:

"By the civil law a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessary supplies, whether the vessel was at her home port or abroad when the repairs and supplies were made and furnished. (Dug. 14, 1; 1 Valin Com., 365; 3 Kent Com., 168; W. & B. Adm. Pr., 155.) But the only lien which the common law recognizes in such cases, independent of statutory regulations, is the possessory lien which arises out of and is dependent upon the possession of the ship, as in cases where goods are delivered to an artisan or tradesman to be repaired or manufactured. Such a lien, as understood at common law, did not attach unless the ship was in the possession of the person who set up the claim, and the extent of the privilege which it conferred was that he might retain the ship in his possession until he was paid the money due him for the repairs made and the supplies furnished. Until paid, he might refuse to surrender the ship, but if he relinquished the possession of the ship his lien was displaced and extinguished."

Westerdell v. *Dale*, 7 T. R., 312.
Justin v. *Ballam*, 1 Salk, 34.
Walkinson v. *Bernadiston*, 2 P. Wms., 367.
3 Kent Com., 169.
Maude & P. Ship, 64.
The Zodiac, 1 Hagg., Adm., 320.
Spartali v. *Benecke*, 10 C. B., 223.

II.

WHAT IS THE CHARACTER OF A LIEN UPON A COMMODITY TRANSPORTED?

In the case of *Bags of Linseed*, 1 Black., 112, Chief Justice TANEY says:

"Undoubtedly the ship owner has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount; and, as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the Courts of Admiralty have jurisdiction, the ship owner may enforce his lien by a proceeding *in rem* in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the ship owner has parted from the possession, but is analogous to the lien given by the common law to the carrier on land, who is not bound to deliver them to the party until his fare is paid; and if he delivers them, the incumbrance of the lien does not follow them in the hands of the owner of consignee. It is nothing more than the right to withhold the goods, and is inseparably associated with his possession, and dependent upon it."

In the case of "*The Eddy*," 5 Wal., 481, Mr. Justice CLIFFORD says:

"Such a lien—that is, the lien of the ship-owner—*is not 'the privileged claim' of the civil law*, but it arises from the right of the ship owner to retain the possession of the goods until the freight is paid, and therefore it is lost by an unconditional delivery of the goods to the consignee. Subject to this explanation, the maxim that the ship is bound to the merchandise and the merchandise to the ship for the performance of all the obligations created by the contract of affreightment, is the settled rule in all the Federal

courts. (*Dupeat* v. *Vance*, 19 How., 168; 20 U. S., XV., 586.)"

* * * * *

"Practice in England is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them till the freight and other charges are paid; and it is held that in such cases the lien of the master continues, as the goods remain in his constructive possession. (*Ward* v. *Felton*, 1 East, 512; *Mael. Ship.*, 369; *Chit. de T. Carr.*, 222.)"

The lien of the ship-owner, therefore, is not a maritime lien within the strictest sense of that term, but is a possessory lien which arises out of the performance of a maritime contract. It is identical with the lien of the carrier by land, and the right of possession is the same. The unconditional delivery divests the lien in one case as well as in the other, the difference only being that one arises out of a maritime contract of carriage, while the other arises out of a contract of carriage by land.

Applying the law to the case at bar, we find that the courts are not quick to construe the delivery as an unconditional delivery, because they favor the right of the ship-owner's retaining the actual or constructive possession, so that he may enforce his lien.

In other words, the court favors the lien of the carrier by water, and there are numerous cases in which the courts have construed that a delivery to the consignee with the reservation that the lien was to be preserved, or that a claim was to be preserved, was sufficient to enable the carrier to enforce it notwithstanding the fact that the cargo was in the actual possession

of the consignee at the time proceedings were instituted.

In other words, it must clearly appear that there was an intention to abandon the lien before the courts will consider a delivery absolute and unconditional so as to divest the lien.

171 Tons of Coal, 4 Blatch., 368.
Kimbal v. *Annie Kimbal*, 2 Clifford, 15.
Volunteer, 1 Sum., 551.
Certain Logs of Mahogany, 2 Sum., 589.
Webb v. *Anderson*, Taney, 518.

The Supreme Court and Appellate Courts of Illinois having found that McCaffrey was in possession of the raft up to the time he surrendered it in pursuance of the decree of the Circuit Court of Mercer County, and that he was entitled to recover for towage of the raft a certain sum of money, these questions are not open for further investigation, and the court here must begin from this point and deal with the questions which this state of facts established.

McCaffrey, therefore, having possession, had a right to hold the raft until he was paid for his towage, and the owner of it could at any time obtain the release of it upon payment of the amount due for towage, and not before.

The next question that arises was, How long was McCaffrey to wait before he took steps to recover for the towage services secured by his lien on the raft?

Was he to wait an indefinite period of time, maintaining his possession, perhaps, at large expense and under circumstances of danger from freshets, floods, storms and weather, with a liability for improper care

while the raft was in his custody, or could he resort to some court which would by appropriate legal proceedings enforce his lien, so that he might obtain payment for his towage services—a court before which all parties in interest could be summoned and heard so that any questions of difference which might arise as to the right of possession, as to the lien, and the amount due, if any there was, could be adjudicated; in fact, a court which could determine all possible questions that could arise between all parties that might be interested in the property detained upon which a lien was claimed, or any amount which was sought to be collected by enforcement of the lien.

We contend that the appropriate court in which to enforce this lien was the Circuit Court of Mercer County; at least this court had concurrent jurisdiction with the Admiralty Court to enforce it.

It had such concurrent jurisdiction under our interpretation of the judiciary act of 1789, as well as under the right of possession which was given by the common law to every carrier and every person who had a possessory lien.

McCaffrey was not a common carrier. The lumber was towed under a charter party and subject to its conditions. He used his steamers for no purpose except to perform his contract with the Schulenberg Co.

He was not towing lumber for any one that chose to apply to him.

He was not making a regular business of it between certain points.

He did not solicit the business of towing rafts for any one who chose to have them towed.

Therefore, he was a private carrier.

It may be contended that if the raft in question could be treated as a commodity carried, that McCaffrey had a right to proceed under Chapter 141 of the Revised Statutes of the State of Illinois, which provides as follows:

"*Left with common carrier, innkeeper or warehouseman—Notice—Sale.*] Section 1. That whenever any trunk, carpet bag, valise, bundle, package, or article of property, transported or coming into the possession of any railroad or express company, or any other common carrier or innkeeper or warehouseman, or private warehouse keeper, in the course of its or his business as common carrier, innkeeper, warehouseman, or private warehouse keeper, shall remain unclaimed, and the legal charges thereon unpaid during the space of six months after its arrival at the point to which it shall have been directed, and the owner or person to whom the same is consigned cannot be found upon diligent inquiry, or, being found and notified of the arrival of such article, shall refuse or neglect to receive the same and pay the legal charges thereon for the space of three months, it shall be lawful for such common carrier, innkeeper, warehouseman or private warehousekeeper to sell such article at public auction after giving the owner or consignee fifteen days' notice of the time and place of sale, through the post office, and by advertising in a newspaper published in the county where such sale is made, and out of the proceeds of such sale to pay all legal charges on such articles, and the overplus, if any, shall be paid to the owner or consignee upon demand."

Not being a common carrier, McCaffery was not within the terms of this statute.

Moreover this half raft had not arrived at St. Louis, Mo., which was the point to which it had been directed.

If entitled to the possession of the raft until the towage charges were paid, he would have to hold it for an indefinite period of time, unless he could by the authority of some court dispose of it.

By appropriate proceedings in the Circuit Court of Mercer County he attempted to obtain this relief. Both appellate tribunals of the State of Illinois have recognized the jurisdiction of this court, and have sanctioned the proceeding as lawful, regular and within the jurisdiction of the court. This proceeding was one which was open to all parties interested, competent to hear and determine any question that might be raised, with full power to execute any decree or judgment it might make, and therefore in every way a competent tribunal.

The proceeding in this case invaded no rights that any owner or other person interested in the raft might have; it deprived no one of the right to contest every question which might be raised in any court, as to any right of property, lien or interest in the thing or against the parties.

III.

WAS McCAFFREY COMPELLED TO RESORT TO A COURT OF ADMIRALTY TO ENFORCE HIS LIEN?

It is contended that resort should have been had to an Admiralty Court, and that the right to proceed to enforce the lien that McCaffrey had, such as it was, lay exclusively within the jurisdiction of the Admiralty Court.

Waiving the question of the inconvenience that the suitor might be put to in a case of this kind, we believe the argument entirely fallacious, because the lien which McCaffrey had on the lumber was a possessory lien and one which was guaranteed him by the common law, as much as by the maritime law.

The lien is as old as transportation by land, and older than transportation by water, because it arose in land transportation before there was transportation by water.

Having a lien by virtue of two laws, the common law, and the maritime law, he chose to enforce his lien as a common law lien rather than as a maritime lien, and therefore, proceeded in the state court, rather than in the Admiralty Court, the former being more convenient than the latter.

There was no intrenchment upon the jurisdiction of a Court of Admiralty, as would be the case, had this raft of lumber been a vessel or a vehicle of commerce, which might be made the subject of a lien that would follow her, irrespective of ownership or possession.

In such a case, a lien arises out of rights acquired solely by the maritime law, following the civil law, and not by the common law, and in most instances the lien is given by maritime law, but whether given by maritime law or by some local law, it must be based on a maritime contract and the right to enforce it by proceedings *in rem*, as distinguished from proceedings *in personam*, as observed in common law courts, is one exclusively granted to the Admiralty Courts. It is more a matter of remedy than right.

In this case we seek to enforce a common law lien in a common law court endowed with chancery powers.

We are not attempting to do this by proceedings *in rem*, as employed in a Court of Admiralty, but are employing the process and procedure observed in the court in which the suit was brought. This process and procedure is not *in rem*, but *in personam*.

We are, therefore, not seeking to enforce a maritime right in a common law court, or employing the remedy of an Admiralty Court to enforce a common law right.

So long as we are not violating the provision of the judiciary act, it is immaterial to this court whether the lien which McCaffrey had in this case is enforced by one or another proceeding, so long as the proceeding is one that is not offensive to the Act of Congress giving to Admiralty Courts exclusively the right to proceed *in rem*.

In determining whether an equitable remedy is within this saving clause it is well for us to consider for a moment the object of the exception. It was intended, was it not, to leave the suitor every remedy which he then had by the common law, to allow him to come into Admiralty, if he saw fit, but not to compel him to do so? This being true, why should an equitable remedy be denied him and a remedy on the law side of the docket be allowed him? Such a distinction is without reason and against the spirit of this statute, whose intent no doubt was to save the suitor in every case where he could have a remedy in the local courts, an expensive proceeding in the Admiralty Court, which would probably be remote from the subject-matter of the suit and the parties thereto. Why would Congress leave him the right to proceed on one side of the docket and not on the other? Here is the court, here is the subject matter, and here are the parties. The remedy we have invoked is certainly within the spirit of the saving clause of the federal law. Why should the machinery we have set in motion not do its work?

Douglas v. Chateaugay Trans. Co., 56 N. Y., 1.

This was an action for damages on account of the death of the plaintiff. The jurisdiction of the state court was questioned and the court in this court says:

"When a right is given, whether by common law or by statute passed after the passage of the Federal Statutes, there must be some remedy when it is withheld, and to enforce it, a common law action will lie wholly irrespective of the foundation of the right, even though Admiralty may also have jurisdiction."

The right of a state court to enforce a possessory lien is upheld by the Supreme Court of Illinois in this case and in the opinion found in the record all of the authorities are collected and commented on, and it is, therefore, unnecessary for us to cite them in this brief.

All of the cases cited by counsel for plaintiff in error, namely,

The "Moses Taylor," 4 Wall., 411.
The Hine v Trevor, Id., 555.
The "Belfast," 7 Wall., 625.
"The Glide,"

are cases in which proceedings were had under the state statutes which created liens upon the vessels, and these liens could, under these state statutes, be enforced by proceedings strictly *in rem* in which the ship or thing was made the defendant, a proceeding similar to a proceeding *in rem* in the Courts of Admiralty.

In all of these cases the court held that a proceeding *in rem* to enforce a lien was exclusively within the jurisdiction of a Court of Admiralty whenever the foundation of such a lien was a maritime contract.

In the case of *Johnson* v. *Chicago & P. E. Co.*, 119 U. S., 388, the court held that a proceeding under the statute of Illinois, where the tort was

not a maritime tort, was a valid proceeding and in that case the court say, quoting from the case of *Leon* v. *Galceran*, 11 Wall., 185:

"This court held that the action *in personam* in the state court was a proper one, because it was a common law remedy, which the common law was competent to give, although the state law gave a lien on the vessel in a case similar to a lien under the maritime law, and it was made enforceable by a writ of sequestration in advance, to hold the vessel as a security to respond to a judgment, if recovered against her owner as a defendant; that the suit was not a proceeding *in rem*, nor was the writ of sequestration; that the bond given on the release of the vessel became the substitute for her; that the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property; and that these views were not inconsistent with any expressed in *The Moses Taylor*, in *The Hine* v. *Trevor*, or in *The Belfast*. The case of *Peyroux* v. *Eaton*, 15 Wall., 382, is a similar one."

And further on in the same opinion, the court say:

"Liens under state statutes, enforceable by attachment in suits *in personam*, are of every day occurrence, and may even extend to liens on vessels, *when the proceedings to enforce them do not amount to admiralty proceedings in rem, or otherwise conflict with the Constitution of the United States*. There is no more valid objection to the attachment proceeding to enforce the lien in a suit *in personam*, by holding the vessel by mesne process to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on the execution. Both are incidents by a common law remedy, which a court of common law is competent to give."

The difference between the proceeding *in rem* in admiralty, and the remedy in a court of common law by

auxilliary process of sequestration or attachment has been pointed out in the cases above and the courts have held that this processs may be employed for the purpose of reaching the property of the defendant, and that a statute giving such a right is a valid statute, even when the contract which is the foundation of the suit or action is founded on a mariine contract.

In this case the proceeding was one authorized by the laws and practice in the courts of State of Illinois and pronounced valid by the highest court of the state, and it matters not to this court what the character of the proceeding was or mode of procedure so long as it was not a proceeding *in rem* as employed by the Admiralty Courts, but was, as stated in the cases above referred to, a proceeding *in personam*, in which the property was held to answer the judgment which might be obtained in the suit.

IV.

CAN THE PLAINTIFF IN ERROR NOW QUESTION THE JURISDICTION OF THE COURT AFTER HAVING GIVEN BOND FOR THE RELEASE OF THE RAFT?

The Knapp Co. is in no position to question the jurisdiction of the court. Before it answered it came in by a petition called a cross motion and asked that it be permitted to take the raft "to St. Louis, Mo.," on giving bond in the sum of $6,000, to pay any lien McCaffrey had, and asserted as a reason therefor "the defendant being in "a court of equity, and believing that it is but right "that this motion be granted, prays the court to "grant the same." That should constitute an estop-

pel. It says our lien is either maritime or passive. We have surrendered the raft under a decree made on the prayer of the Knapp Company. It has passed into the channels of commerce. We can now certainly neither enforce the lien in admiralty, or by holding the raft.

It permitted and asked the court below to take jurisdiction, for the purpose of decreeing to it possession of the property which it took. Can it now be permitted to say, that though chancery had jurisdiction for that purpose, it has not jurisdiction to go on and do complete justice between the parties? What could its averment that it was in a court of equity mean, but that it consented for that court to exercise its jurisdiction? Suppose McCaffrey's bill had been dismissed for want of equity, instead of without prejudice, could he then have come to this court and asked to have that decree reversed on the ground that the Circuit Court of Mercer County had no jurisdiction? We apprehend not. And that is precisely the position assumed by the Knapp Company. It may be said we consented that the decree might be entered. This is true, but we then claimed, and still claim, that the court had the power to enter that decree either with or without consent. The Knapp Company secured the rendition of that decree. It is estopped to assert that the court lacked the power to enter it.

In the case of *Johnson* v. *Chicago & P. Elevator Co.*, *supra*, the vessel was released upon giving a bond in substantially the same terms as in this case, and the court in that case says:

"From the time of the issuing of the writ of restitution on the same day the petition was filed, the tug

disappears from the proceedings, the bond having taken her place. The judgment was one *in personam* against Johnson & Christy, as required by Section 21 of the statute, in a case where the attached vessel has been discharged from custody. That section also provides that the proceedings subsequent to the judgment, 'shall be the same as now provided by law in personal action in the courts of record in this state.'

So far, therefore, as this suit is concerned, the action, in the shape in which it comes before this court, is a suit *in personam*, with an attachment as security: the attachment being based on a lien given by the state statute, and a bond having been, by the act of the defendant, substituted for the thing attached."

The suit in this case, like in the case above referred to, is one now strictly *in personam* with the bond, which was voluntarily given to pay any indebtedness or lien that McCaffrey had on the raft, in place of the latter.

Gindele v. *Corrigan*, 129 Ill., 582.

In this case the court uses the following language:

"It is manifest that appellants have voluntarily submitted themselves to the jurisdiction of the state courts, and it is clear that after having done so, by filing a bond provided by the statute for the release of the vessel, the proceeding was no longer *in rem*, but necessarily *in personam*, and no other than a personal judgment could have been rendered."

It never was a proceeding *in rem*, and the *res* which was retained under McCaffrey's lien was released upon application of the plaintiff in error. They voluntarily substituted a bond in place of the *res*, and then take up the contest as to whether there was anything due to McCaffrey.

They cannot, therefore, at this time, question the

jurisdiction of the court into which they voluntarily came, to the jurisdiction of which they submitted themselves, and in which they gave bond under which they assumed certain obligations which we are now simply asking them to carry out.

The decision of the Supreme Court of Illinois is therefore without error and should be sustained.

C. E. KREMER,
GUY C. SCOTT,
For Defendant in Error.

March, 1900.